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Independent Application of State Constitutional Provisions to Questions of Criminal Procedure

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THE INDEPENDENT APPLICATION OF STATE CONSTITUTIONAL PROVISIONS TO QUESTIONS OF CRIMINAL PROCEDURE

Since constitutional questions arise frequently in criminal practice,[1] defense attorneys may find this area particularly well suited to the independent application of state constitutional law. In matters of criminal procedure, as in other constitutional areas examined in this issue, the successful enlargement of federal constitutional rights depends upon the utilization of state constitutional provisions in combination with the adequate state ground doctrine.[2] Frequent application of state law to questions of criminal procedure may be particularly appropriate since the state court has the opportunity to observe firsthand the problems of local criminal law enforcement. Such familiarity gives rise to a degree of expertise not shared by the Supreme Court of the United States. It therefore is not surprising that the Supreme Court views independent state constitutional rulemaking as a proper experimental means of accommodating unique local criminal investigative and law enforcement demands.[3] Ironically, some state courts have chosen not to unilaterally expand on federally established minimums due to a concern for uniform and consistent nationwide law enforcement.[4] It seems clear, however, by virtue of their diverse situations, that courts in New York and Alaska will see recurring criminal procedure problems of an altogether different nature. For this reason, these states should probably view even identical state constitutional provisions in a different light, based on their differing circumstances.

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1. Constitutions are, of course, limitations on a government's power in dealing with its citizens, a relationship which explains the frequency of constitutional questions in criminal cases. "It [is] in criminal prosecutions that the power of the state [is] arrayed most clearly against the individual." Yackle, *The Burger Court and the Fourth Amendment,* 26 KAN. L. REV. 335, 428 (1978) [hereinafter cited as Yackle]. Mr. Yackle provides valuable insight into problems of fourth amendment analysis.

2. *See Introduction: An Examination of the Wisconsin Constitution,* 62 MARQ. L. REV. 483 (1979).

3. *See, e.g.,* Oregon v. Hass, 420 U.S. 714, 728 (1975) (Marshall, J., dissenting). *See also* Johnson v. Louisiana, 406 U.S. 356, 376 (1972) (Powell, J., concurring); Sibron v. New York, 392 U.S. 40, 60-61 (1968); Ker v. California, 374 U.S. 23, 34 (1963).

4. *See* Note, *Stepping Into the Breach: Basing Defendants' Rights on State Rather Than Federal Law,* 15 AM. CRIM. L. REV. 339, 340 (1978) [hereinafter cited as *Stepping Into the Breach*].

I. Practical Problems at the Interface Between Federal and State Supreme Courts

The application of state constitutional provisions is not without pitfalls, however. To understand the practical problems inherent in the utilization of nonfederal grounds to enlarge the rights of the criminal defendant, one need only consider the following example. Assuming that the majority of a state supreme court feels strongly about the application of constitutional principles, both state and federal, to a particular set of facts, the state court will, at the very least, desire to make its ruling the law of the state. At best, the court would like to see its ruling applied nationally. If the United States Supreme Court has previously held contrary to the position of the state court, there is but one path to walk. The state court must simply set forth its ruling specifically articulating the nonfederal basis of the decision; it is then insulated from Supreme Court review[5] and assured of continued vitality on the state level. Problems arise, however, when the Supreme Court has not yet addressed the constitutional question before the state court. In this situation, the state supreme court faces a knotty technical problem. If it bases its decision either solely on state grounds or on both state and federal grounds, the United States Supreme Court is precluded from agreeing with the state court on the issue,[6] preventing, or at least postponing, a nationwide application of the rule. In such a case, the utilization of independent state grounds, motivated primarily out of fear of reversal, may prevent the Supreme Court from passing upon worthy issues of national importance.

On the other hand, if only a federal ground is used, the Supreme Court may reverse without remanding. To the majority of the state court, such a turn of events has three negative results. First, the defendant in the case in question is deprived of the beneficial state court ruling, and this is so merely because the state court desired to give the Supreme Court a chance to agree. Second, the state court must await a similar case before it can again rule as it originally desired. In the meantime, the trial courts of the state will apply the federal

5. Falk, *Foreword: The State Constitution: A More than "Adequate" Nonfederal Ground,* 61 Calif. L. Rev. 273, 275 (1973).

6. *Id.* at n.12.

rule, and the defense bar will very likely neglect to appeal the issue. Finally, the Supreme Court will have established persuasive authority on the issue, thereby providing impetus to other state courts to hold in conformity with the federal rule.[7]

Of course, if the Supreme Court reverses and remands, the state court may invoke an adequate and independent state ground, curing the first two undesirable effects: the defendant will gain the desired relief, and a local rule of state constitutional dimension will be established. However, there is no guarantee that such cases will be remanded to state courts for consideration in light of state constitutional standards. This further complicates a state court's selection of a constitutional basis, state or federal, for its ruling.

Two recent United States Supreme Court decisions illustrate this problem. In *Oregon v. Hass,*[8] the defendant had been given his *Miranda* warnings[9] and had requested counsel.[10] Upon being questioned, however, the defendant made statements to the police. The Oregon Supreme Court held that these statements were inadmissible for any purpose,[11] distinguishing *Harris v. New York,*[12] which held that statements made by a defendant who had not received *Miranda* warnings were admissible for impeachment purposes.[13] The United States Supreme

7. *Id.* at 280.

8. 420 U.S. 714 (1975).

9. Miranda v. Arizona, 384 U.S. 436 (1966), requires that the following procedures must be observed in order to properly safeguard a suspect's fifth amendment rights against self-incrimination: the individual in custody must, prior to interrogation, be told that he has the right to remain silent; that anything he says can and will be used against him in a court of law; that he has the right to consult with an attorney and to have the attorney present at the interrogation; and that if he is indigent, an attorney will be appointed as his counsel. *Id.* at 444-45, 467-73. If the above procedures are not followed, any statements which are made by the defendant are not admissible in the prosecution's case in chief. *Id.* at 479.

10. 420 U.S. at 715-16. Once a suspect requests an attorney, the interrogation must cease until one is present. Miranda v. Arizona, 384 U.S. at 474.

11. State v. Hass, 267 Ore. 489, 517 P.2d 671 (1973).

12. 401 U.S. 222 (1971).

13. *Id.* at 226. The Oregon court recognized the validity of the *Harris* rationale which was premised on the theory that, insofar as the prospect of exclusion of the statements from the state's case in chief will sufficiently deter the police from failing to give adequate *Miranda* warnings, it is not necessary to hold the statements inadmissible for impeachment purposes. The Oregon court further reasoned that a police officer will ordinarily give adequate warnings, since "[e]xperience has taught" that there is a good possibility that the suspect will talk during questioning. State v. Hass, 267 Ore. at ____, 517 P.2d at 673. However, the court reasoned that when an officer

Court reversed the Oregon court, finding that the statements, though inadmissible in the State's case in chief, could be introduced to impeach the defendant should he testify to the contrary.[14]

Significantly, the Supreme Court did not remand the case,[15] and to date, the Supreme Court of Oregon has had no opportunity to pass again on the question. We are left without a clue as to whether the Oregon court's inclination on the merits will surface again as a creature of its state constitution.

Mr. Justice Marshall, dissenting in *Hass*,[16] was troubled by the majority's failure to remand the case to the Oregon court for clarification as to the basis, state or federal, of the decision.

> The majority flatly states that the case was decided below solely on federal constitutional grounds, but I am not so certain. Although the state court did not expressly cite state law in support of its judgment, its opinion suggests that it may well have considered the matter one of state as well as federal law . . . [and] it seems quite possible that the state court intended its decision to rest at least in part on independent state grounds. In any event, I agree with Mr. Justice Jackson that state courts should be "asked rather than told what they have intended."[17]

However, Justice Marshall's well-founded concern was probably misplaced in *Hass*. The Oregon court had specifically based its ruling on one prior Oregon and two prior federal decisions.[18] The state case upon which the Oregon court relied quite clearly had its basis solely in federal constitutional law; in fact, the

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has given the warnings and the defendant asks for an attorney, the exclusion of any subsequent statements from the state's case in chief does not deter further improper questioning at all. The officer, realizing that the defendant will probably make no statements once he talks to his attorney, may attempt to obtain admissions from the defendant before the attorney arrives in order to give the prosecution valuable impeachment evidence. From the officer's standpoint nothing has been lost by continuing the interrogation after the suspect asks for an attorney. *Id.*

14. Oregon v. Hass, 420 U.S. at 722-24.

15. *Id.* at 724.

16. 420 U.S. 726 (Marshall, J., dissenting).

17. *Id.* at 728.

18. The Oregon decision stated: "In such a situation, there is no pressure whatsoever to obtain compliance and the prophylactic exclusion of the evidence as dictated by *Miranda, Escobedo,* and *Neely* [239 Ore. 487, 395 P.2d 557 (1964), *modified and rev'd on rehearing,* 398 P.2d 482 (1965)] is still required." State v. Hass, 267 Ore. 489, ——, 517 P.2d 671, 673 (1973) (footnotes omitted).

court in that decision specifically declined to determine the applicability of the state constituion.[19] Consequently, there was no state constitutional foundation for the Oregon court's holding in *Hass*.

The question remains, however, whether sound principles of federalism would favor remanding a case such as *Hass* to the state court to consider application of its own law even though the original decision was based on federal law.[20] Albeit inadvertently, that is precisely what occurred in *South Dakota v. Opperman*.[21]

In *Opperman*, the Supreme Court held that a custodial or inventory search of a lawfully seized automobile pursuant to standard police procedures was reasonable and not prohibited by the fourth amendment.[22] The setting in *Opperman* was nearly identical to that in *Hass*. In each case, the trial court had denied the defendant's suppression motion, the defendant was convicted, the state supreme court reversed solely on the basis of defendant's constitutional objection[23] and the United States Supreme Court reversed the state decision.[24] For some unspoken reason, however, the court in *Hass* merely reversed while in *Opperman* it reversed and remanded. The Oregon Supreme Court was thus deprived of the second chance afforded the South Dakota court. That court, following the suggestion of Justice Marshall in dissent,[25] found on remand

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19. We have never held that the Oregon constitutional prohibition against self-incrimination . . . was the basis of this exclusionary rule and we need not determine that issue . . . . [T]he right to remain silent during a police interrogation [is] a Fourteenth Amendment right derived from the Fifth Amendment of the Federal Constitution.

State v. Neely, 239 Ore. 487, ___, 395 P.2d 557, 560-61 (1964), *modified and rev'd on rehearing*, 398 P.2d 482 (1965) (citations omitted).

20. For a scathing criticism of such federalism in constitutional law, *see* Yackle, *supra* note 1, at 432.

21. 428 U.S. 364 (1976).

22. *Id.*

23. State v. Opperman, 228 N.W.2d 152 (S.D. 1975); State v. Hass, 267 Ore. 489, 517 P.2d 671 (1973).

24. South Dakota v. Opperman, 428 U.S. 364 (1976); Oregon v. Hass, 420 U.S. 714 (1975).

25. "On the remand it should be clear in any event that this Court's holding does not preclude a contrary resolution of this case or others involving the same issues under any applicable state law. *See Oregon v. Hass*, 420 U.S. 714, 726 (1975) (MARSHALL, J., dissenting)." South Dakota v. Opperman, 428 U.S. 364, 396 (1976) (Marshall, J., dissenting).

that its own state constitutional prohibition against unreasonable searches and seizures, almost identical to the fourth amendment, required that its original ruling be reinstated as a matter of state law.[26]

It is unfortunate that issues involving implementation of basic state policies may rise and fall depending on whether the United States Supreme Court adds a few extra words at the end of its opinion. As a practical matter, however, the problem is of little concern to the appellate advocate, whose immediate concern is instead to persuade the court that the defendant has a valid constitutional grievance. After arguing the merits of the constitutional question, however, there would seem to be value in asking a state supreme court to rule on the basis of the state constitution. Furthermore, it would be consistent with basic principles of federalism to request that the United States Supreme Court, should it disagree with the position of the defendant, remand the case to the state court to afford it the opportunity to utilize a variant state constitutional interpretation.

II. SUPERVISORY POWERS

The theory that local problems require local rulemaking supports the independent use of state constitutional provisions in expanding the rights of criminal defendants. However, in order to avail itself of the adequate state ground doctrine, a state court need only base its holding on any nonfederal ground. Such grounds may be statutory,[27] constitutional or may arise out of the common law.[28] Being mindful of local problems in criminal procedure, yet hesitant to interpret its state charter to be at odds with the Federal Constitution, a state court might instead avail itself of its supervisory powers.[29] In *McNabb v. United States*,[30] the United States Supreme Court commented on its supervisory power:

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26. State v. Opperman, 247 N.W.2d 673 (S.D. 1976).

27. State *ex rel.* Arnold v. County Court of Rock County, 51 Wis. 2d 434, 187 N.W.2d 354 (1971).

28. *See Introduction: An Examination of the Wisconsin Constitution*, 62 MARQ. L. REV. 483 (1979).

29. *See generally* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

30. 318 U.S. 332 (1943).

> [T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. . . . Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction.[31]

A state court, like a federal court, may exercise its supervisory power, thereby providing an adequate state ground to insulate its decision from further review. For example, in *Commonwealth v. Campana,*[32] the Pennsylvania Supreme Court held that "all charges resulting from [a] criminal episode of each appellant should have been consolidated at one trial, and consequently the second prosecutions [involving the same episode] violated the Double Jeopardy Clause of the Fifth Amendment."[33] The United States Supreme Court remanded "to consider whether [the] judgments are based on federal or state constitutional grounds, or both."[34] On remand, the Pennsylvania court noted that "our supervisory power over state criminal proceedings is broad, and this Court need not . . . limit its decision to the minimum requirements of federal constitutional law."[35] The Pennsylvania Constitution, as relied upon by the *Campana* court,[36] vests the court with supervisory powers.[37] The Supreme Court of the United States subsequently declined to review the merits of the case, presumably because the state court had relied on its supervisory powers.[38] In several post-*Campana* decisions, the Pennsylvania court has specifically relied upon these powers to expand minimum federal constitutional guarantees.[39]

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31. *Id.* at 340.
32. 452 Pa. 233, 304 A.2d 432 (1974).
33. *Id.* at 240, 304 A.2d at 434 (footnotes omitted).
34. Pennsylvania v. Campana, 414 U.S. 808 (1973).
35. Commonwealth v. Campana, 455 Pa. 622, 624, 314 A.2d 854, 855 (1974).
36. *Id.*, at 624, 314 A.2d at 855.
37. PA. CONST. art. V, § 10.
38. Pennsylvania v. Campana, 417 U.S. 969 (1974) (summary denial of certiorari).
39. *See, e.g.,* Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351, 357, 361 (1974) (Pomeroy, J., concurring) (right to counsel extended to pre-indictment lineups). *Contra,* Kirby v. Illinois, 406 U.S. 682 (1972).

The Wisconsin Supreme Court, like its counterpart in Pennsylvania, is vested with "superintending and administrative authority over all the courts."[40] This broad and undefined power has in the past been exercised only in extraordinary circumstances, either when an adequate remedy was unavailable on appeal or when appellate relief might cause a party irreparable hardship.[41] That power is apparently jurisdictionally based and limited to matters of judicial procedure.[42] It is therefore unclear whether this constitutional authority would encompass the full range of criminal procedural law which, of course, entails both substantive and procedural considerations of both the courts and law enforcement agencies. The Wisconsin Supreme Court, however, has demonstrated its willingness to exercise such authority in new and unusual situations. For example, in *Scarbrough v. State,*[43] the court made specific use of its constitutional superintending authority to take notice of inadequate judicial resources in Milwaukee County as a partial justification for an eight month pretrial delay.[44]

However, the use of this constitutionally based superintending authority as a means of implementing independent state constitutional expansion is untested in the State of Wisconsin, and analytically, it is probably the better practice for

40. WIS. CONST. art. VII, § 3(1). *See* Mosing v. Hagen, 33 Wis. 2d 636, 148 N.W.2d 93 (1967). There may also exist a common-law foundation for the court's supervisory power over criminal procedures. In civil cases, the court has held that when the state constitution was adopted, the authority to regulate procedure was considered an inherent judicial power. *In re* Cannon, 206 Wis. 374, 240 N.W. 441 (1932). However, the court was referring to judicial procedure, and therefore presumably not procedures employed by law enforcement authorities. Certainly the law of criminal procedure involves both judicial and law enforcement procedures and thus it is unclear whether such inherent power encompasses the regulation of police procedures. But there may be little difference between the regulation of police as opposed to judicial procedure. For example, although the question of the propriety of a given search ostensibly deals only with investigative practice, the exclusion from evidence of the fruits of such a search is solely a matter of trial procedure.

41. State *ex rel.* LaFollette v. Circuit Court, 37 Wis. 2d 329, 155 N.W.2d 141 (1967).

42. The superintending power "is a high power, which enables this court, by the use of all necessary and proper writs . . . to *control the course of litigation* in inferior courts when such a court either refuses to act within its jurisdiction, or acts beyond its jurisdiction, to the serious prejudice of the citizen." State *ex rel.* Reynolds v. County Court, 11 Wis. 2d 560, 565, 105 N.W.2d 876, 879 (1960) (quoting State *ex rel.* Tewalt v. Polland, 112 Wis. 232, 234, 87 N.W. 1107, 1108-09 (1901))(emphasis added).

43. 76 Wis. 2d 87, 250 N.W.2d 354 (1977).

44. *Id.* at 103 n.28, 250 N.W.2d at 362 n.28. Of course, this use of the power may not be exactly the sort desired by the defense bar.

the court to base independent constitutional rulings on a substantive constitutional provision rather than to engage in quasi-legislative rulemaking under the guise of its supervisory powers.

III. THE VIEW OF THE WISCONSIN SUPREME COURT: WAVERING ON INDEPENDENT EXPANSION

Several state courts, most notably in California,[45] Alaska[46] and Hawaii,[47] have charted the revitalization of their constitutions with amazing vigor.[48] Wisconsin has not. The decisions examined below indicate that while traditionally the Wisconsin court has exhibited progressive tendencies in the area of constitutional criminal procedure, it has yet to fully implement the state expansionist model in its modern context. Such expansion occurs when a state court specifically recognizes that it is affording greater constitutional protections under the state charter than those which are mandated by fourteenth amendment principles. It will be seen, however, that at least two members of the court[49] have given solid recognition to the ex-

45. Allen v. Superior Court, 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976) (defendant's privilege against self-incrimination limits scope of prosecutorial discovery); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (rejecting United States v. Robinson, 414 U.S. 218 (1973), which held permissible a full search incident to any custodial arrest based on probable cause); People v. Moore, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968) (exclusionary rule applied to commitment proceedings for adults). For an exhaustive listing of cases illustrating the California court's willingness to rely on its own constitution, *see* Falk, *Foreword: The State Constitution: A More than "Adequate" Nonfederal Ground,* 61 CALIF. L. REV. 273, 277 nn.16 & 17, 278 n.18 (1973).

46. *See, e.g.,* Blue v. State, 558 P.2d 636 (Alaska 1977) (extending right to counsel to line-ups held prior to charging or arguably even before arrest). *Contra,* Kirby v. Illinois, 406 U.S. 682 (1972). *Cf.* Ravin v. State, 537 P.2d 494 (Alaska 1975) (Alaska's constitutional privacy clause protects private use of marijuana in one's home); Roberts v. State, 458 P.2d 340 (Alaska 1969) (right to counsel at taking of handwriting exemplars).

47. *See, e.g.,* State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974) (rejecting United States v. Robinson, 414 U.S. 218 (1973)); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); text accompanying notes 133-35 *infra.*

48. For an amendment-by-amendment breakdown of examples of different states' reliance on state constitutions, *see Stepping Into the Breach, supra* note 4; *Project Report: Toward an Activist Role for State Bills of Rights,* 8 HARV. C.R.-C.L. L. REV. 271 (1973).

49. *See* note 76 *infra.* The most vociferous advocate of the new federalism on the Wisconsin court is Justice Abrahamson. In the most recent term of the court, Justice Abrahamson has twice written concurring opinions in which she suggests that the Wisconsin constitutional provision against unreasonable searches and seizures should

pansionist model in the face of the court's general refusal to apply it.

The State of Wisconsin was barely ten years old when the supreme court decided *Carpenter v. Dane County,*[50] in which the court found that an accused felon had a constitutional right to have counsel appointed at the expense of the state. This decision predated the identical federal ruling by over 100 years[51] and was in that sense highly progressive. *Carpenter,* however, does not stand for the proposition that Wisconsin has historically expanded federal constitutional rights. That decision preceded the adoption of the fourteenth amendment by nine years,[52] coming at a time when federal intervention in state criminal procedure was unforeseen. Therefore, while *Carpenter* does demonstrate the willingness of the Wisconsin court to independently construe and apply state constitutional provisions, it is not a bona fide example of state expansion on federal constitutional minimums in its modern context.

In 1923, the Wisconsin court decided *Hoyer v. State,*[53] thereby adopting the exclusionary rule some 40 years before the rule was imposed upon the states by the United States Supreme Court.[54] Like *Carpenter,* the *Hoyer* decision was not at odds with federal constitutional law; the United States Supreme Court had already applied the exclusionary rule to federal criminal cases[55] and Wisconsin was merely aligning itself with the prevailing federal rule.

State v. Kroenig[56] is another case often cited as an example of the Wisconsin court's expansionist tendencies.[57] *Kroenig*

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serve as the basis for determining the validity of warrantless searches. Thompson v. State, 83 Wis. 2d 134, 265 N.W.2d 467 (1978) (Abrahamson, J., concurring); State v. Starke, 81 Wis. 2d 399, 260 N.W.2d 739 (1978) (Abrahamson, J., concurring, joined by Heffernan, J.). In the most recent case, the state ground had not even been briefed by the parties. Thompson v. State, 83 Wis. 2d 134, 149, 265 N.W.2d 467, 474 (1978). The practice of espousing disposition of a case on grounds not briefed may be poor jurisprudence, but it is at least arguably more appropriate in a concurring or dissenting opinion.

50. 9 Wis. 249 (1859).

51. Gideon v. Wainwright, 372 U.S. 335 (1963).

52. The fourteenth amendment to the United States Constitution was ratified on July 9, 1868.

53. 180 Wis. 407, 193 N.W. 89 (1923).

54. Mapp v. Ohio, 367 U.S. 643 (1961).

55. Gouled v. United States, 255 U.S. 298 (1921).

56. 274 Wis. 266, 79 N.W.2d 810 (1956).

57. *See, e.g.,* Browne v. State, 24 Wis. 2d 491, 503 n.5, 129 N.W.2d 175, 180 n.5 (1964), *cert. denied,* 379 U.S. 1004 (1965); *see also Project Report: Toward an Activist*

held that evidence of a blood test taken at the request of police officers prior to an arrest and without a warrant must be excluded under the Wisconsin constitutional provision pertaining to searches and seizures. Approximately three months later, the United States Supreme Court, faced with similar facts, managed to avoid the merits of the constitutional issue by declaring once again that fourth amendment proscriptions against unreasonable searches and seizures did not apply to the states.[58] *Kroenig* did not depart in any way from federal precedent. Rather, it merely stated a rule of law for Wisconsin in the absence of federal authority.

In the 1964 decision of *State ex rel. Barth v. Burke,*[59] the court extended the right to counsel to misdemeanor defendants facing any substantial prison sentence. While the *Barth* ruling preceded the United States Supreme Court's decision in *Argersinger v. Hamlin,*[60] which extended this right to state criminal defendants, it was, like the foregoing cases, not at variance with contemporaneous federal constitutional law as applied to federal criminal prosecutions.[61]

Role for State Bills of Rights, 8 HARV. C.R.-C.L. L. REV. 271, 349 (1973). Curiously enough, the court in *Browne* held that search and seizure questions are matters of "federal constitutional law" while in the same breath recognizing *Kroenig* as a case where state constitutional standards were more demanding. 24 Wis. 2d at 502-03, 129 N.W.2d at 179-80. The Wisconsin Supreme Court has recently voiced approval of *Kroenig* in dictum. State v. Jenkins, 80 Wis. 2d 426, 429, 259 N.W.2d 109, 111 (1977).

58. Breithaupt v. Abram, 352 U.S. 432 (1957). The United States Supreme Court has, of course, overruled *Breithaupt* in that respect. Mapp v. Ohio, 367 U.S. 643 (1961). *But see* Schmerber v. California, 384 U.S. 757 (1966), wherein the Court held that a blood test taken *incident to arrest* was constitutionally permissible. The Court intimated that, given the possibility that passage of time could result in the destruction of evidence, a blood test taken prior to arrest might be permissible. *Id.* at 770-71. The supreme courts of Texas and Michigan have rejected *Schmerber* on state constitutional and statutory grounds, respectively. *See, Stepping Into the Breach, supra* note 4, at 347-48.

59. 24 Wis. 2d 82, 128 N.W.2d 422 (1964).

60. 407 U.S. 25 (1972). The *Argersinger* Court held that a defendant who faced potential incarceration upon conviction was entitled to counsel under the sixth amendment.

61. It must be noted that *Barth* came on the heels of Gideon v. Wainright, 372 U.S. 335 (1963), and thus one might infer that the Wisconsin Supreme Court was not engaged in any independent constitutional analysis, but was merely interpreting federal constitutional maxims. Moreover, the United States Supreme Court had previously invoked the right to counsel in "all" federal criminal prosecutions in Johnson v. Zerbst, 304 U.S. 458 (1938). Finally, two factors downplay the *Barth* decision as expansionist precedent: the court discussed no decision or constitutional provision, federal or state, in making its "constitutional" holding, thus clouding the actual foun-

The only pristine example of the court's application of the modern expansionist model is found in *State v. Wallace.*[62] In *Wallace,* the court upheld the well-established Wisconsin rule that, in a hearing to determine the admissibility of a defendant's confession, the state must prove beyond a reasonable doubt that the confession was voluntarily given and not the result of coercion.[63] The decision was contrary to a then-recent Supreme Court decision[64] which held that the federal constitution required proof by a mere preponderance of the evidence. The Wisconsin court quoted the United States Supreme Court as follows: "Of course, the states are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values that they find at stake."[65] Since the Wisconsin court characterized the burden of the prosecutor as being "constitutional"[66] it may be assumed that the Wisconsin Constitution served as the basis for the decision.[67]

As if in balance, the state court has, on at least one occasion, also lowered its standards to meet federal minimums. At one time, the prevailing Wisconsin rule recognized the right to counsel at a precharge lineup.[68] However, after the United States Supreme Court denied the right to counsel in such a situation[69] the Wisconsin court followed suit,[70] confessing that its prior ruling had not been based on its independent judg-

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dation of the decision; further, the defendant faced a total of 19 years of possible imprisonment. In view of these factors, even though the defendant was charged only with several misdemeanors, it is not certain that the Wisconsin court would have recognized the defendant's right to counsel had he been faced with, for example, only a six-month term upon conviction. The decision did not read as if it was to be applied to misdemeanor defendants in general.

62. 59 Wis. 2d 66, 207 N.W.2d 855 (1973).

63. *Id.* at 79-80, 207 N.W.2d at 862.

64. Lego v. Twomey, 404 U.S. 477 (1972).

65. State v. Wallace, 59 Wis. 2d at 80, 207 N.W.2d at 862 (quoting Lego v. Twomey, 404 U.S. 477, 489 (1972)).

66. 59 Wis. 2d at 79, 207 N.W. 2d at 862.

67. The import of *Wallace* as an expansionist case may be lessened by the fact that the state did not contest its constitutional burden. "The trial court specifically found that the statements made in . . . [the prosecutor's] office was [*sic*] voluntary, beyond reasonable doubt, and on appeal the state has in no way intimated that this court should now change its long established rule." *Id.* at 80, 207 N.W.2d at 862. Therefore, the issue was not technically before the court.

68. Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d 626 (1970).

69. Kirby v. Illinois, 406 U.S. 682 (1972).

70. State v. Taylor, 60 Wis. 2d 506, 520-24, 210 N.W.2d 873, 881-83 (1973).

ment but on its mistaken interpretation of previous United States Supreme Court decisions.[71] And while the court recognized its power to impose stricter state standards, it declined to do so.[72]

One would hesitate, then, to characterize the Wisconsin Supreme Court as traditionally activist. Although the decisions are in a sense progressive, only in *Wallace* did the court recognize a divergence in the scope of the Wisconsin and United States Constitutions and even this conclusion is based on inference. Those cases in which the Wisconsin Supreme Court held in conformity with the prevailing, more protectionist federal rule in advance of the Court's fourteenth amendment application to the states are not examples of independent expansive construction of state constitutional provisions. Nonetheless, the importance of these decisions should not be overlooked. One of the factors supporting independent expansionist activity is a court's view of traditions and values unique to the people of its state.[73] Although the Wisconsin court has not yet fully embraced the expansionist model, the presence of prior progressive decisions does serve as a barometer of state traditions. An appellant would therefore be wise to bring these decisions to the court's attention when requesting an independent state constitutional analysis.[74]

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71. *Id.* at 523, 210 N.W.2d at 882.

72. State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973). Ironically, the *Wallace* case, decided the same year as *Taylor,* is susceptible to a similar argument. The foundation case for the rule approved in *Wallace* was State *ex rel.* Goodchild v. Burke, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). In *Goodchild,* the court's analysis was restricted primarily to issues of federal constitutional law. Thus, had it chosen to do so, the Wisconsin court could have held that the rule had no independent state basis, and then lowered the prosecutor's burden in accordance with the federal rule. *See* notes 65-69 and accompanying text *supra.*

73. *See Introduction: An Examination of the Wisconsin Constitution,* 62 MARQ. L. REV. 483 (1979).

74. In State v. Doe, 78 Wis. 2d 161, 171-72, 254 N.W.2d 210, 216 (1976), Justice Heffernan, writing for the court, cited Carpenter v. Dane County, 9 Wis. 249 (1859), and Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923), as examples of Wisconsin's willingness to expand state constitutional protection beyond federal minimums. The court, however, chose not to exercise its prerogative in *Doe* and found that, in this instance, federal and state constitutional principles were consistent. 78 Wis. 2d at 172, 254 N.W.2d at 216. Thus, although the court has utilized the expansionist model sparingly, it has certainly recognized its power to do so.

IV. Sample Applications of the Theory to Specific Problems in Criminal Procedure

Historical analysis of the more activist decisions of the Wisconsin Supreme Court indicates that the court has exhibited progressive tendencies in three constitutional areas: search and seizure,[75] right to counsel,[76] and the privilege against self-incrimination.[77] Armed with such precedent, an appellant would probably enjoy a better chance of success in these areas. Consequently, two specific criminal procedure problems will now be examined: the vicarious standing rule and the use of otherwise inadmissible confessions for impeachment purposes. These two topics have been chosen for different reasons. The vicarious standing rule will be examined because the Wisconsin court has exhibited a substantive inclination toward the merits of the rule. The confession-impeachment problem will be discussed because the court's decision in *State v. Wallace* has already given greater scope to the privilege against self-incrimination than that afforded by the United States Constitution.

A. The Vicarious Standing Rule

The Supreme Court of the United States has held "that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of evidence."[78] In *Brown v. United States,*[79] the Supreme Court established a federal rule of limited standing. A defendant has standing only if: (1) he is on the premises at the time of the contested search and seizure; (2) he enjoys a proprietary or possessory interest in the premises; or (3) he is charged with an offense which includes as an essential element

75. *See* State v. Kroenig, 274 Wis. 266, 79 N.W.2d 810 (1956); Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923). *See also* Thompson v. State, 83 Wis. 2d 134, 265 N.W.2d 467 (1978) (Abrahamson, J., concurring); State v. Starke, 81 Wis. 2d 399, 260 N.W.2d 739 (1978) (Abrahamson, J., concurring); State v. Doe, 78 Wis. 2d 161, 254 N.W.2d 210 (1976).

76. *See* State *ex rel.* Barth v. Burke, 24 Wis. 2d 82, 182 N.W.2d 422 (1964); Carpenter v. Dane County, 9 Wis. 249 (1859). *See also* State v. Wallace, 59 Wis. 2d 66, 207 N.W.2d 855 (1973). *But see* State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973).

77. *See* State v. Wallace, 59 Wis. 2d 66, 207 N.W.2d 855 (1973).

78. Alderman v. United States, 394 U.S. 165, 171-72 (1969).

79. 411 U.S. 223 (1973).

possession of the seized evidence at the time of the alleged search and seizure.[80] As a matter of federal constitutional law, fourth amendment rights are personal and cannot be vicariously asserted.[81]

Recently, in *Rakas v. Illinois,*[82] the Supreme Court again reviewed the law of fourth amendment standing. While acknowledging the vitality of the principles underlying the standing rules, the Court attempted to do away with the inquiry into standing altogether, reasoning that the standing issue should be absorbed by substantive fourth amendment analysis. As the Court saw it, the issue in such cases is whether the defendant's "legitimate expectation of privacy"[83] has been invaded. If so, the evidence of the search should be excluded. If, on the other hand, no privacy expectations have been infringed, no exclusion will result and no standing inquiry is needed.[84]

The result, of course, would be identical. To a defendant, it is of little moment whether he lacks standing to contest the search because the constable violated the privacy rights of a third party rather than his own or whether he loses on the merits because he lacks a judicially recognized expectation of privacy. Under either the former traditional standing analysis or the latter "expectation" analysis approved in *Rakas,* the evidence is admitted at trial.

Contrary to either analysis, the vicarious or derivative standing rule provides that a defendant may contest the validity of a search even though such search violated not his rights but those of a third person.[85] The rule has been adopted by the supreme courts of two states[86] and has received considerable

80. *Id.* at 229. The latter of these three standing requirements is often called "automatic" standing and should not be confused with vicarious standing. *See* Jones v. United States, 362 U.S. 257 (1960).

81. Brown v. United States, 411 U.S. 223, 230; Alderman v. United States, 394 U.S. 165, 171-72; Simmons v. United States, 390 U.S. 377 (1968).

82. 439 U.S. 128 (1978).

83. *Id.* at 143 (citing Katz v. United States, 389 U.S. 347 (1967)).

84. Mr. Justice White, dissenting, did not take issue with either the majority's view of standing or its new single-step substantive analysis. The dissent merely felt that the defendant's personal legitimate expectation of privacy had been violated. *Id.* at 156.

85. *Stepping Into the Breach, supra* note 4, at 342-43.

86. *See* Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971); State v. Culotta, 343 So. 2d 977 (La. 1976). Other states have either codified or considered codifying the rule, listed in State v. Mabra, 61 Wis. 2d 613, 621-22, 213 N.W.2d 545, 549 (1973).

support from commentators[87] and the courts.[88]

In disallowing the derivative or vicarious assertion of fourth amendment rights, the Supreme Court relied on the following premise: "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."[89] Yet this "personal rights" premise is contrary to contemporaneous fourth amendment analysis. For example, in *United States v. Calandra,*[90] the Supreme Court held that the exclusionary rule would not apply to exclude evidence from grand jury proceedings even if such evidence was seized in violation of fourth amendment rights. In so limiting the scope of the exclusionary rule, the court portrayed it merely as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[91]

For purposes of determining the scope of application of the exclusionary rule in *Calandra,* the Court found the rule to be a judicial device. For purposes of standing, however, the Court has declared the rule to be a personal constitutional right.[92] But surely a proper analysis of the vicarious standing rule vis-a-vis the exclusionary rule should not rely on mutually exclusive major premises. Instead, given the currently recognized judicial source of the exclusionary rule, a court should limit its inquiry to whether the vicarious assertion of exclusionary rights is consistent with, or in furtherance of, the underlying objectives of the exclusionary rule as articulated by its judicial creators. Thus, the court must identify the purposes of the exclusionary rule, without regard to its source, and then determine

87. *See, e.g.,* State v. Mabra, 61 Wis. 2d 613, 622 n.3, 213 N.W.2d 545, 549 n.3 (1973); Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 367 (1967); Yackle, *supra* note 1, at 384; Note, *Standing and the Fourth Amendment,* 38 U. CIN. L. REV. 691 (1969); Comment, *Standing to Object to Unreasonable Searches and Seizures,* 34 MO. L. REV. 575 (1969).

88. *See, e.g.,* Alderman v. United States, 394 U.S. 165, 200 (1969) (Fortas, J., concurring in part and dissenting in part).

89. Rakas v. Illinois, 439 U.S. 128, 133-34 (1978), (quoting Alderman v. United States, 394 U.S. 165, 174 (1969) and citing Brown v. United States, 411 U.S. 223 (1973)); Simmons v. United States, 390 U.S. 377 (1968)).

90. 414 U.S. 338 (1974).

91. *Id.* at 348.

92. *Id.*

the compatibility of those objectives with the application of the vicarious standing rule.[93]

This is precisely the analysis undertaken by the California Supreme Court in *Kaplan v. Superior Court of Orange County*,[94] in which the court reaffirmed a prior application of the vicarious standing rule.[95] The California court explained that the two-fold purpose of the exclusionary rule "was to deter law enforcement officers from engaging in unconstitutional searches and seizures by removing their incentive to do so, and to relieve the courts from being compelled to participate in such illegal conduct."[96] The court noted further that the dual policies of the exclusionary rule are applicable whenever evidence is obtained contrary to constitutional search and seizure provisions, even if the defendant's personal constitutional rights remained inviolate.[97] The court, however, declined to determine whether the vicarious standing rule is required by the California search and seizure clause,[98] noting only that the rule is "based on [the] constitutionally compelled"[99] exclu-

93. Although the "personal rights" premise seems to supply the major foundation for the rejection of the vicarious standing rule, it is possible that the premise has become merely a catch phrase restatement of the rule of limited standing. In Alderman v. United States, 394 U.S. 165 (1969), the Supreme Court did examine the vicarious standing rule in terms of its effect on the deterrent objectives of the exclusionary rule, and held that sufficient deterrence would be achieved even if standing were granted to only those persons whose individual fourth amendment rights were violated. Therefore, it is possible that the foundation for the federal rule of limited standing is not the "personal rights" premise, but rather the premise that the derivative assertion of exclusionary rights would have a minimal effect on the deterrence of police misconduct. Since this is precisely the analysis undertaken in United States v. Calandra, it is arguable that *Calandra* and those cases which limit standing are not at all inconsistent.

94. 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).

95. The Supreme Court of California had originally adopted the vicarious standing rule in People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

96. 6 Cal. 3d at 155-57, 491 P.2d at 4, 98 Cal. Rptr. at 651-52.

97. *Id.* at 156-58, 491 P.2d at 4-5, 98 Cal. Rptr. at 652-53. The logical inference is that the California court does not view the exclusionary rule as an extension of an individual's constitutional right.

98. CAL. CONST. art. I, § 19.

99. 6 Cal. 3d at 161, 491 P.2d at 8, 98 Cal. Rptr. at 656. This nonconstitutional ruling was all that was required for the disposition of the case. The prosecutor argued that § 351 of the California Evidence Code, which stated that "(e)xcept as otherwise provided by statute, all relevant evidence is admissible," constituted a legislative preemption of the judicially created vicarious standing rule. This, of course, has the ultimate effect of excluding relevant evidence even though such exclusion was not provided by statute or, as argued the prosecution, by the California or federal constitutions. The court responded with some history of legislative intent which indicated that

sionary rule. While it is clear that the California court seized the exclusionary rule itself as a constitutional mandate, it is unclear whether the derivative standing rule is a constitutional, as opposed to judicial, rule of law. In any event, the ruling in *Kaplan* was founded exclusively on California law.

In Louisiana, the rule is clearly a creature of the state constitution. In *State v. Cullotta,*[100] the Supreme Court of Louisiana held that a 1974 amendment to the Louisiana Constitution[101] granted standing to anyone adversely affected by a search. Since a defendant against whom the fruits of a search are offered as evidence is necessarily adversely affected by the search, the court held that she had standing to contest it, noting that the broadened application of the exlusionary rule was founded in the "expectation that its deterrent effect will be increased."[102]

Before discussing the Wisconsin Supreme Court's treatment of vicarious standing, a brief history of the exclusionary rule in Wisconsin seems in order. The rule, adopted in 1923 in *Hoyer v. State,*[103] was based on article I, sections 8 and 11[104] of the Wisconsin Constitution, the state counterparts of the fifth and fourth amendments, respectively. Justice Eschweiler, writ-

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§ 351 was meant to preempt all limitations on the admissibility of relevant evidence except those limitations "based on" a constitutional provision. *Id.* at 160, 491 P.2d at 7, 98 Cal. Rptr. at 655. Thus, the court had only to decide whether the vicarious standing rule was constitutionally *based* and not whether it was constitutionally *compelled.* Finding such basis, the rule fell within the exception to § 351.

100. 343 So. 2d 977 (La. 1977).

101. LA. CONST. art. I, § 5, as amended (1974) states:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

102. 343 So. 2d at 982 (quoting Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974,* 35 LA. L. REV. 1, 23-24 (1974)).

103. 180 Wis. 407, 193 N.W. 89 (1923).

104. WIS. CONST. art. I, § 8 reads in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself." WIS. CONST. art. I, § 11, reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

ing for the *Hoyer* majority, held that an illegal search or seizure violated the prohibition against unreasonable warrantless searches and that the introduction into evidence of the product of the unconstitutional transgression violated the defendant's privilege against self-incrimination.[105] The privilege against self-incrimination has, of course, been abandoned as a basis for the exclusion of nontestimonial evidence,[106] yet there is some indication that, until recently, the Wisconsin court still viewed the exclusionary rule as a personal constitutional right.[107] However, in 1974, in *Conrad v. State,*[108] Justice Heffernan, writing for the court, launched an extensive discussion in dicta of the exclusionary rule, suggesting that the rule lacked a constitutional basis. "The exclusionary rule is a judge-made one in furtherance of conduct that courts have considered to be in the public interest and to suppress conduct that is not."[109] He further noted that the rule had its genesis "not in the constitution, but in the grant of superintending powers . . . ."[110] Most importantly, Justice Heffernan recognized the two-fold purpose of the rule as articulated in *Kaplan v. Superior Court.*[111] *Conrad*

105. 180 Wis. at 415, 193 N.W. at 92 (1923).

106. *See* Trager & Lobenfeld, *The Law of Standing Under the Fourth Amendment,* 41 BROOKLYN L. REV. 421, 452-53 (1975).

107. In Kluck v. State, 37 Wis. 2d 378, 386, 55 N.W.2d 26, 29 (1967), the court wrote that "[t]he exclusion of evidence in violation of the strictures placed upon searches and seizures has for its purpose the protection of privacy." Similarly, it has been noted that "exclusion of evidence. . .puts meaning into the Fourth Amendment's right of privacy and restrains the police from being over zealous in law-enforcement activities. . . . The right protected is the individual's right of privacy." Alston v. State, 30 Wis. 2d 88, 94, 140 N.W.2d 286, 289 (1966).

108. 63 Wis. 2d 616, 218 N.W.2d 252 (1974).

109. *Id.* at 636, 218 N.W.2d at 262.

110. *Id.* It is interesting to note that Justice Heffernan used the term "superintending powers" which is the language of the Wisconsin constitutional provision bestowing superintending authority upon the court. WIS. CONST. art. VII, § 3(1). The United States Supreme Court usually refers to its power as a "supervisory power." *See generally* Hill, *The Bill of Rights and the Supervisory Power of the Federal Courts, supra* note 29; Note, *The Supervisory Power of the Federal Courts, supra* note 29.

111. 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971). Like the California court, the *Conrad* court noted that:

> [t]he rationale of the exclusionary rule is twofold: . . . to deter unlawful or undesirable or unconstitutional police conduct, and . . . to insure some integrity in the judicial process by not having the judicial process sanction, approve and be party to constitutional violations or undesirable or unlawful police conduct in allowing evidence to be used notwithstanding the manner in which it was seized.

63 Wis. 2d at 635, 218 N.W.2d at 262.

therefore, seems to be based on reasoning which would point toward acceptance of the expanded standing rule in this state.

However, before an appellate advocate can argue the merits of state adoption of the derivative standing rule, a minor threshold burden must be born. The language of the federal and state constitutional proscriptions against unreasonable searches and seizures are identical.[112] This has led the Wisconsin Supreme Court to remark that search and seizure problems "are a matter of federal constitutional law"[113] and that federal standards and principles are "generally applicable"[114] to corresponding state constitutional questions. However, the Wisconsin court has not always seen identity of language as an absolute bar to independent construction,[115] and need not continue that course in search and seizure decisions.

If the court can be convinced that identity of constitutional language is not an absolute barrier to divergence in constitutional construction, it must next reconcile the standing issue with the objectives of the exclusionary rule. Soon after the federal rule of limited standing was conclusively established in *Brown,* the Wisconsin Supreme Court twice passed on the issue.

In the first case, *State v. Christel,*[116] the court found *Brown* controlling. The defendants in *Christel* were charged and convicted of possession with intent to sell hashish. The police had discovered the hashish in an illegal search of a package addressed to a third party and sent via private parcel service. The trial court found that the defendants lacked standing to object

112. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11.

113. State v. Paszek, 50 Wis. 2d 619, 624, 184 N.W.2d 836, 839 (1971). *See also* State v. Beal, 40 Wis. 2d 607, 612, 62 N.W.2d 640, 643 (1968); Kluck v. State, 37 Wis. 2d 378, 155 N.W.2d 26 (1967).

114. State v. Paszek, 50 Wis. 2d at 624, 184 N.W.2d at 839.

115. Certainly, it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment. . . . This court has never hesitated to do so.

. . . .

This court has demonstrated that it will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded.

State v. Doe, 78 Wis. 2d 161, 171-72, 254 N.W.2d 210, 215-16 (1976) (citations omitted).

116. 61 Wis. 2d 143, 211 N.W.2d 801 (1973).

to the search and the supreme court agreed.[117] The defendants, however, had failed to raise the issue of vicarious standing in their appeal, choosing instead to rely solely on the third type of standing established in *Brown,* that is, that a defendant charged with illegal possession has automatic standing to contest the seizure of the contraband from him.[118] But since the *Christel* defendants did not possess the hashish at the time of the search, which took place at the offices of the private parcel service, such automatic standing was unavailable to them. Although the court relied on *Brown,* which had specifically denied derivative standing, the *Christel* court did not examine the merits of the vicarious rule at all, and obviously did not examine the issue in terms of Wisconsin law.

Later in the same term the court decided *State v. Mabra.*[119] Again the defendant did not squarely raise the derivative rights question. Nonetheless, the court discussed the rule at length, remarking that

> [i]t might well be that a defendant on the constitutional grounds of due process and the basic concept of a fair trial could argue that he had a constitutional right to object to any evidence illegally seized from anyone being used against him although such search and seizure did not violate his personal fourth amendment right.[120]

However, the defendant in *Mabra* was found to have independent grounds for standing to object to the search and seizure and the court, therefore, found it unnecessary to pass on the vicarious standing issue. The court did, however, note the logical consistency of the vicarious standing rule. Thus, the court recognized that the function of the exclusionary rule is "to discourage unconstitutional conduct and to insure integrity in the judicial process by disregarding evidence produced through an impermissible procedure."[121] It further noted that this function is not served when the unconstitutional conduct is protected from judicial scrutiny by a rule of standing. "The logic of the exclusionary rule, and the deterrent objectives on which

117. *Id.* at 155-57, 211 N.W.2d at 807-08.
118. *Id.* at 149-50, 211 N.W.2d at 804.
119. 61 Wis. 2d 613, 213 N.W.2d 545 (1973).
120. *Id.* at 621-22, 213 N.W.2d at 549-50.
121. State v. Smith, 72 Wis. 2d 711, 714, 242 N.W.2d 184, 186 (1976).

it is based, apply equally whether or not the search itself 'aggrieved' the defendant."[122]

While it is impossible to guess whether the court would adopt the vicarious standing rule as a matter of state constitutional and judicial law, it is clear in light of *Mabra* that the rule has received some recognition upon which sound argument can be based.

B. Impeachment by Use of Inadmissible Miranda Statements

In *Miranda v. Arizona,*[123] the United States Supreme Court required that, prior to the instigation of custodial interrogation, an accused must be informed of certain constitutional rights.[124] These required warnings are intended to protect an accused's fifth amendment rights against self-incrimination; therefore, if the statements are obtained when the accused has not yet been informed of his rights, when he did not understand or intelligently waive his rights or when other circumstances indicate that such statements were involuntarily made, they are inadmissible in the prosecution's case in chief.[125] In *Harris v. New York,*[126] however, the United States Supreme Court decided that such "*Miranda*-less" statements could be used to impeach a defendant-witness who gave testimony inconsistent with his prior statements.[127] The *Harris* majority held that one of the objectives of the *Miranda* rule was to deter police misconduct. The Court felt, however, that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief"[128] and that "[t]he shield pro-

122. Commentary to AMERICAN LAW INSTITUTE MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES, Official Draft No. 1, July 15, 1972, Art. 290 § SS290.1(5), *quoted in* State v. Mabra, 61 Wis. 2d 613, 622, 213 N.W.2d 545, 549 n.4 (1973). This argument was specifically rejected by the United States Supreme Court in Alderman v. United States, 394 U.S. 165, 174-75 (1969).

123. 384 U.S. 438 (1966).

124. *Id.* at 467-73. *See* note 9 *supra.*

125. 384 U.S. at 479.

126. 401 U.S. 222 (1971).

127. A distinction was made between statements which were made involuntarily and those which were made without both the benefit of *Miranda* warnings and also the intelligent waiver of *Miranda* rights. A statement involuntarily made cannot be used for any purpose as it is inherently untrustworthy. For Wisconsin decisions on this issue, see Upchurch v. State, 64 Wis. 2d 553, 219 N.W.2d 363 (1974); Wold v. State, 57 Wis. 2d 344, 204 N.W.2d 482 (1973); Gaertner v. State, 35 Wis. 2d 159, 150 N.W.2d 370 (1967); Shepard v. State, 88 Wis. 185, 59 N.W. 449 (1894). By comparison, "*Miranda*-less" statements voluntarily made in ignorance of constitutional rights are thought not to be inherently untrustworthy.

128. 401 U.S. at 225.

vided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[129]

Four justices dissented in *Harris,*[130] giving two reasons for their opinion: first, the prospect of being impeached by the prior confession would unduly fetter the defendant's decision whether to testify or remain silent; and second, the deterrence objective would be undermined by admitting the tainted confession for any purpose.[131] Pennsylvania, Hawaii and California have rejected *Harris* and held that their state constitutions render "*Miranda*-defective" statements inadmissible for any purpose.[132] In *State v. Santiago,*[133] the Supreme Court of Hawaii found that *Miranda* protections have "an independent source in the Hawaii Constitution's privilege against self-incrimination."[134] The court then held that the Hawaii Constitution compelled the result urged by the *Harris* dissent. This constitutional decision was seen as necessary in order to effectively protect a defendant's right to choose whether to confess to a crime, encourage proper police conduct and insure the integrity of the judicial process.[135] And in *Commonwealth v. Triplett,*[136] the Supreme Court of Pennsylvania took issue with *Harris.* The court, citing its constitution, reasoned that the *Harris* rule unfairly interfered with the defendant's right to testify on her own behalf.[137] In *People v. Disbrow,*[138] the Califor-

129. *Id.* at 226.

130. *Id.* It is interesting to note that the dissent, *id.* at 231 n.4, cited Gaertner v. State, 35 Wis. 2d 159, 150 N.W.2d 370 (1967) as an example of Wisconsin's disagreement with the *Harris* majority's opinion. In *Gaertner,* the Wisconsin Supreme Court merely held that confessions found to be untrustworthy are to be excluded from trial. *See* note 127 *supra.* However, there exists some dicta in the *Gaertner* decision from which the *Harris* dissent might infer the Wisconsin court's agreement. "We do not think an accused who takes the witness stand waives his constitutional right against self-incrimination and involuntary confessions. 35 Wis. 2d at 173, 150 N.W.2d at 377. Restricted to its dispositive language, the *Gaertner* decision stands only for the proposition that involuntary statements are to be excluded because they are unworthy of belief.

131. Harris v. New York, 401 U.S. at 231-32 (Brennan, J., dissenting).

132. For a discussion of *Harris* and the contrary decisions of California, Hawaii and Pennsylvania, see *Stepping Into the Breach, supra* note 4, at 352-56.

133. 53 Hawaii 254, 492 P.2d 657 (1971).

134. *Id.* at 266, 492 P.2d at 664.

135. *Id.*

136. 462 Pa. 244, 341 A.2d 62 (1975).

137. *Id.* at 248-49, 341 A.2d at 64; PA. CONST. art. I, § 9.

138. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

nia Supreme Court became the third state court to reject *Harris*, formulating some additional reasons for excluding the evidence. Noting that even *Harris* would not operate so as to admit the defendant's involuntary statements for purposes of impeachment, the court registered its fear that the *Harris* rule would "resurrect the remains of the earlier voluntariness test . . . [and] the evidentiary thicket *Miranda* was designed to avoid."[139] In addition, the California court shared the *Harris* dissent's concern regarding a possible lessening of the deterrent effect on police misconduct.[140] Principally, however, the court based its ruling on the concern that a jury would be unable to limit its consideration of the confession solely to the question of a defendant's veracity.[141]

By requiring a greater prosecutorial burden of proof in determining the admissibility of *Miranda* statements in the prosecution's case in chief, Wisconsin too has chosen to afford greater state protection to the right against self-incrimination than is required by the Constitution of the United States.[142] While this may be a retreat from the *Harris* position, however, the court has yet to completely eliminate defective *Miranda* statements from a criminal trial. Having accepted the *Harris* rule soon after its establishment,[143] Wisconsin has adhered strictly to it.[144] The *Harris* rule has not been the topic of any dissent, nor has the Wisconsin court ever discussed expanding on the *Harris* minimum.

However, if the scope of Wisconsin constitutional criminal procedure is to be expanded, *Harris* seems a likely and appropriate target for challenge. The reasoning used by other courts, and in particular that used by the California court, provides a sound basis for constitutional argument. In addition, the Wisconsin court's demonstrated concern for protection of the privilege against self-incrimination, as embodied in article I, section

139. *Id.* at 111-12, 545 P.2d at 278, 127 Cal. Rptr. at 366.

140. *Id.* at 113, 545 P.2d at 279, 127 Cal. Rptr. at 367.

141. *Id.* at 112, 545 P.2d at 279, 127 Cal. Rptr. at 367.

142. *Compare* Micale v. State, 76 Wis. 2d 370, 251 N.W.2d 458 (1977) (prosecution must establish beyond a reasonable doubt that *Miranda* rights were given and statement was voluntary) *with* Lego v. Twomey, 404 U.S. 477 (1972) (*Miranda* and voluntariness of confession must be proven by preponderance of the evidence).

143. Ameen v. State, 51 Wis. 2d 175, 186 N.W.2d 206 (1971).

144. *See* Upchurch v. State, 64 Wis. 2d 553, 219 N.W.2d 363 (1974); Wold v. State, 57 Wis. 2d 344, 204 N.W.2d 482 (1973).

8 of the state constitution, provides a solid basis for argument in such a case.

IV. CONCLUSION

The independent use of state constitutional provisions in matters of criminal procedure is not yet a powerful tool for the Wisconsin criminal defense bar. It may never be. Members of the criminal defense bar, in discussion with the writer, have indicated a lack of enthusiasm for arguing in favor of implementation of an expansionist model of the state constitution.[145] Certainly, the argument will not excite the Wisconsin criminal defense attorney to the degree that it has undoubtedly excited her counterpart in California.[146]

Despite this lack of Wisconsin constitutional activity, recent recognition of the doctrine by the court may reveal an untapped source of constitutional activism. Whether the practice will ever become as prevalent as it has in several other states is largely dependent on the make-up of the Wisconsin court and the decisions of the United States Supreme Court. A flourish of state constitutional activity would surely result if more justices of the Wisconsin court were to view independent state constitutional rulemaking as an appropriate exercise of their judicial authority. On the other hand, whatever the make-up of the Wisconsin court, the nature of Wisconsin judicial tradition is such that it would be surprising were the court to tolerate any drastic retrenchment on Warren Court criminal procedure decisions. For example, at least four United States Supreme Court justices have advocated an end to per se application of the exclusionary rule.[147] It would be a surprise indeed if Wisconsin were to follow suit and abandon the cherished constitutional principles pronounced so long ago in *Hoyer v. State*.[148]

Whatever the current status of the expansionist argument, it should not blithely be ignored by appellate counsel for crimi-

145. They have variously described the independent use of the Wisconsin Constitution as: "a garbage argument," "a one paragraph throw-in," or a "last resort."

146. The independent use of state constitutional provisions is by far more frequent in California. *See* note 45 *supra*.

147. *See Stepping Into the Breach*, *supra* note 4, at 342; Yackle, *supra* note 1, at 423 n.626.

148. 180 Wis. 407, 193 N.W. 89 (1923).

nal defendants. If nothing else, the argument forces the supreme court to examine the substantive merits of the procedure in question in light of Wisconsin constitutional traditions and values and thereby forecloses a dangerously routine reliance on federally established minimums without examination of the underlying principles upon which such minimums are based. Ignoring the vitality of the Constitution of the State of Wisconsin may be tantamount to ignoring the collective values of the people of the state, but such lofty rhetoric disguises the important effect of independent state constitutional construction — the avoidance of erosion of individual constitutional liberties.

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